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No. 84-1181

IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

BENIGNO CLASS,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

JOINT APPENDIX

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Petition for Certiorari Filed January 18, 1985
Certiorari Granted April 1, 1985

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Chronological List of Relevant Docket Entries

No. 84-1181

The People of the State of New York against Benigno Class

Date	*Docket Entries*
May 21, 1981	Indictment is filed charging Benigno Class with Criminal Possession of a Weapon in the Third Degree.
June 8, 1981	Defendant is arraigned on the indictment and pleads not guilty.
June 11, 1981	Defendant files a pre-trial motion to suppress the weapon recovered from his automobile.
June 18, 1981	The People file their affirmation in opposition to defendant's pre-trial suppression motion.
July 10, 1981	An evidentiary hearing is held before Justice William Holland to determine defendant's suppression motion. Police Officers Lawrence Meyer and William McNamee testify for the People and defendant testifies on his own behalf.
October 13, 1981	Defendant's motion to suppress the weapon recovered from his automobile is denied.

Chronological List of Relevant Docket Entries

Date	*Docket Entries*
November 4, 1981	Defendant pleads guilty to the charge of Criminal Possession of a Weapon in the Third Degree as contained in the indictment.
December 10, 1981	Defendant is sentenced to a period of probation not to exceed five years.
January 8, 1982	Defendant files a notice of appeal from his judgment of conviction.
February 11, 1982	Defendant is granted leave to appeal as an indigent and William E. Hellerstein is appointed to represent him.
October 21, 1983	Defendant's appeal is argued before a panel of the New York Supreme Court, Appellate Division, First Department. At the argument, Mark C. Cogan represents defendant and Roger L. Stavis represents the People.
November 29, 1983	The New York Supreme Court, Appellate Division, First Department affirms defendant's judgment of conviction. Justice John Carro dissents from the Court's decision.
December 19, 1983	Justice John Carro grants defendant leave to appeal to the New York Court of Appeals.
January 10, 1984	Defendant is granted leave to appeal to the New York Court of Appeals as an indigent and William E. Hellerstein is assigned to represent him.

Chronological List of Relevant Docket Entries

Date	*Docket Entries*
October 12, 1984	Defendant's appeal is argued before the New York Court of Appeals. At the argument, Mark C. Cogan represents defendant and Roger L. Stavis represents the People.
November 27, 1984	The New York Court of Appeals reverses the order of the New York Supreme Court, Appellate Division and orders the suppression of the weapon and the dismissal of the indictment. Judges Matthew J. Jasen and Hugh R. Jones dissent from the court's decision.

Indictment, Filed May 21, 1981

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF THE BRONX

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS—VFO

Defendant.

1X012126

Counts

CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE
265.02

DATE VOTED: 5-15-81

DATE FILED: 5-21-81

A TRUE BILL

/S/ B. KELLER
Foreman

MARIO MEROLA
District Attorney

Indictment, Filed May 21, 1981

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX, BY THIS INDICTMENT, ACCUSE THE DEFENDANT OF THE CRIME OF CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE COMMITTED AS FOLLOWS:

THE DEFENDANT ON OR ABOUT MAY 11, 1981, IN THE COUNTY OF THE BRONX, KNOWINGLY AND UNLAWFULLY POSSESSED A LOADED FIREARM, TO WIT: A LOADED PISTOL, SUCH POSSESSION NOT BEING IN THE DEFENDANT'S HOME OR PLACE OF BUSINESS.

THE SUBJECT MATTER OF THIS COUNT BEING AN ARMED FELONY AS THAT TERM IS DEFINED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW.

MARIO MEROLA
District Attorney

Notice of Motion to Suppress Evidence

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF THE BRONX

Indictment No. 1552/81

PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

SIRS AND MADAMS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of JUAN A. CAMPOS, attorney for the defendant herein, the undersigned will move the Supreme Court, Bronx County, Part 80, on the 19th day of June, 1981 at 9:30 in the forenoon, or as soon thereafter as counsel can be heard for an order

Suppressing any physical evidence taken from BENIGNO CLASS in violation of his Constitutional rights, or in the alternative for a hearing at which the issues of this Motion to suppress may be litigated; and

For such other and further relief as to the Court seems just and proper.

Dated: New York, New York
June 11, 1981

Yours, etc.

JUAN A. CAMPOS
Campos & Wojszwilo
170 Broadway
New York, N.Y. 10038
(212) 766-1386

To: MARIO MEROLA
District Attorney
Bronx County

Chief Clerk of Supreme Court
Bronx County

Affirmation of Juan A. Campos

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF THE BRONX

Indictment No. 1552/81

PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

JUAN A. CAMPOS, does hereby affirm to be true under penalty of perjury the following allegations:

1. I am the attorney for the defendant BENIGNO CLASS in the above-captioned matter, and as such, am fully familiar with the facts and circumstances herein.

2. This affirmation is made in support of defendant's motion to suppress the physical evidence that is the subject of the charge contained in aforesaid indictment.

3. This affirmation is based upon information and belief, the sources being inspection of official court papers and various police forms provided by the prosecution, and conversations with the defendant.

4. On May 11, 1981 BENIGNO CLASS was stopped while driving an automobile for violations of the Vehicle and Traffic Law.

Affirmation of Juan A. Campos

5. As Mr. Class stood by the police car in conversation with one of the police officers, the second officer approached his car, opened the car door and after looking inside took out a handgun.

6. The weapon was not visible from outside the vehicle being recovered only after a search of the car was conducted by [the] officer.

7. Mr. Class did not consent to the search of the vehicle nor were the officers in possession of a search warrant. Prior to the search of the car, Mr. Class would have merely been issued summons[es] for violation[s] of [the] Vehicle and Traffic Law. The vehicle would have been released to his family pursuant to standard police procedures.

8. In fact, later that same day, defendant's family was notified and the vehicle was released to a member of his family.

9. Under the circumstances the search of the car was unreasonable and violative of defendant's Constitutional rights.

WHEREFORE, deponent respectfully requests that this Court issue an order directing that the property seized be suppressed as evidence against BENIGNO CLASS in any criminal proceeding, or that this Court order a hearing and for such other and further relief which the Court deems just and proper.

Dated: New York, New York
June 11, 1981

/s/ JUAN A. CAMPOS

JUAN A. CAMPOS

(Affidavit of Service Omitted in Printing)

People's Affirmation in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

JANE KOCH GELLMAN, under penalty of perjury and pursuant to Rule 2106 of the C.P.L.R., hereby affirms and states:

I am an Assistant District Attorney in the Office of Mario Merola, District Attorney of Bronx County, and am submitting this affirmation in response to defendant's motion.

Defendant seeks a *Mapp* hearing and suppression of the weapon seized. As defendant was the driver of the car, it would appear that he has legal standing to make this request. The People oppose defendant's motion and deny the factual allegations made in support thereof. We do, however, consent to a pre-trial hearing regarding the same.

WHEREFORE, defendant's motion should be denied except as indicated above.

Dated: June 18, 1981
Bronx County

/s/ JANE KOCH GELLMAN

JANE KOCH GELLMAN
Assistant District Attorney

(Affidavit of Service Omitted in Printing)

Transcript of Proceedings

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: PART 82

MOTION TO SUPPRESS

Indictment No. 1552-81

PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

(Criminal Possession of Weapon in the 3rd Degree)

July 10, 1981
851 Grand Concourse
Bronx, New York 10451

Before:

HON. WILLIAM HOLLAND,
Justice.

Appearances:

FOR THE PEOPLE:
MARIO MEROLA, Esq.,
Bronx County District Attorney
By: MICHAEL HELFER, Esq.,
Assistant District Attorney

FOR DEFENDANT:
JUAN CAMPOS, Esq.

JUDITH JENSEN
Senior Court Reporter

Testimony of Police Officer Lawrence Meyer

* * *

[2] POLICE OFFICER LAWRENCE MEYER, Shield Number 31534, 43rd Precinct Anti-Crime, New York City Police Department, having been called as a witness for the People, was duly sworn, and testified as follows:

Court Officer: Police Officer Lawrence Meyer, M-E-Y-E-R, Shield 31534, assigned to the 43rd Precinct Anti-Crime.

The Court: All right, you may proceed.

Direct examination by Mr. Helfer:

Q. Officer Meyer, I direct your attention to May 11th, [3] this year. Were you working on that day?

A. Yes, I was.

Q. And, do you remember your tour of duty?

A. I was doing a ten to six.

Q. Now, at approximately four-thirty in the afternoon, did you have occasion to make an arrest?

A. Yes, I did.

Q. What was the location of that arrest?

A. The arrest was made at Bronx River Avenue and Westchester Avenue.

* * *

Testimony of Police Officer Lawrence Meyer

* * *

Q. What was the name of the individual you placed under arrest?

A. Mr. Benito [sic] Class.

Q. Can you tell the Court and Counsel the circumstances surrounding the arrest of Mr. Class?

A. We were on routine patrol and we were traveling south [4] bound on Bronx River Avenue; when we reached the intersection of Watson Avenue, we observed the Defendant's vehicle traveling northbound on Bronx River Avenue in our direction. It appeared that the car was moving at a high rate of speed. We also noticed at that point that the windshield on the vehicle was also broken. We made a U-turn and followed the vehicle to Westchester Avenue and Bronx River Avenue. At that time, we approached the Defendant's vehicle, and on the driver's side, displayed—my partner displayed his shield. We told him to pull the car over to the corner. He did. We put our car directly behind his. At that point, Mr. Class got out of the vehicle, walked back to the radio car and entered in a conversation with myself.

Q. Were you seated at that point or were you out of the car?

A. Excuse me?

Q. Were you seated at that point or were you out of the car?

A. I was standing in front of the unmarked radio car.

Q. Where was your partner?

A. He exited the passenger side and walked over to the Defendant's vehicle.

Q. Continue.

A. At that point, I asked Mr. Class for a license and registration. [5] He presented me with a registration and an insurance identification car. [sic] I asked him again for his license. He said he had none. At that point, I observed Officer McNamee open the vehicle door, reach in and

he seemed to pick up something off the floor. He did so. He showed it to me. It was a pistol. He put it down, I believe, in his jacket pocket and walked back to me. At that time, I told the Defendant he was under arrest, and Officer McNamee then unloaded the gun, handed it to me with six bullets.

Q. Okay. I have no further questions of this witness, Judge.

* * *

The Court: Was the Defendant the only person in that vehicle?

The Witness: Yes, he was.

The Court: Nobody else?

The Witness: No.

Cross-examination by Mr. Campos:

Q. Officer Meyer, what was the time that you first observed the Defendant's automobile, what make and model was that car?

A. It's a '72 Plymouth. Blue.

[6] Q. Two door or four door?

A. Two door.

Q. The time that you first observed the Defendant's car, you stated you were going southbound on Watson, and Westchester Avenue.

A. Southbound on Bronx River Avenue.

Q. And, the Defendant was going northbound?

A. Correct.

Q. You said the Defendant—what drew the attention to the Defendant's car was that you noticed that he was going at a high rate of speed, is that correct?

A. Yes.

Q. Approximately, in your opinion, how fast was he going?

A. Approximately thirty-five, forty miles an hour.

Testimony of Police Officer Lawrence Meyer

Q. Were there other vehicles—movement of vehicle traffic there heavy?

A. At that time, I believe so.

Q. Did Defendant stop for any lights?

A. Yes, he did.

Q. How many lights?

A. One.

Q. At what corner?

A. The traffic light is on Westchester Avenue, and that's [7] the only light.

Q. Was this before or after you had stopped the Defendant?

A. He was already stopped when we pulled up next to him.

Q. The time you were on duty, were you in an unmarked police car, is that correct?

A. Yes.

Q. Were you in plain clothes or uniform?

A. Yes.

The Court: Plain clothes?
The Witness: Plain clothes.

Q. Were you the driver or the recorder of that car?

A. I was the driver.

Q. When you noticed the Defendant's car, did you immediately make a U-turn or go to another light to take another street in order to follow the Defendant?

A. No, we immediately made a U-turn.

Q. How far away were you from the Defendant when you began following the Defendant's car on—going northbound on Bronx River and Westchester?

A. When he passed us, we immediately made a U-turn and he had stopped at the light behind the traffic, and we pulled up right behind him, right next to him, I should say.

Testimony of Police Officer Lawrence Meyer

Q. When you pulled up beside his car or behind his [8] car . . .

A. Right, beside it.

Q. . . . and your partner identified himself as a police officer . . .

A. Yes.

Q. . . . and, did—the Defendant then pulled over to the side of the street, is that correct?

A. Yes, he did.

Q. Who got—exited the car first? Were you and your partner exiting the car first or [did] the Defendant exit his car?

A. As soon as the vehicle stopped, the Defendant immediately got out of the car and began walking back to us, as we were exiting our vehicle.

Q. Officer, you stated that Mr. Class gave you his registration and an insurance identification and did you make a check of those documents?

A. He gave me a registration and an insurance card, yes.

Q. Did you make—did you check those documents out to see if they matched?

A. Later, yes, in the station house.

Q. At that time, you were engaged in conversation with my client, you testified that your brother officer, Police Officer McNamee went to the driver's side of the car, is that [9] correct?

A. Yes, he did.

Q. Did he check the car out first or did he immediately open the door and go inside?

A. Well, as I testified, I was in conversation with the Defendant, and I knew that Officer McNamee had opened the front door of the car, and I believe he called to me. I looked at him and he showed me a pistol. He stuck it in his pocket, and I told Mr. Benigno [Class] that he was under arrest.

Q. There came a time after that you made an arrest that you examined the car, is that correct?

A. Excuse me?

Testimony of Police Officer Lawrence Meyer

Q. Did you get a good look at the car?

A. Afterwards.

Q. Yes.

A. Correct.

Q. And, this—the windshield, the cracked windshield where was it, was it on the passenger side or the driver's side?

A. I believe it was the passenger side.

Q. Was it a small crack or large crack?

A. It was a point of impact and then the windshield had shattered out from that.

Q. Is it normal police procedure for stopping motorists [10] who have cracked windshields?

A. Yes.

Q. Do you recall the weather conditions there at that time, four-thirty on May 11th?

A. I believe, I don't recall. No. I don't recall.

Q. You don't recall whether it was [a] sunny day? Was it a rainy day?

A. I believe it had rained earlier in the day and it was sunny at that point. I don't really recall.

Q. Do you recall if the Defendant had his windshield—when you first observed the Defendant's car, did he have the wipers on the windshield—windshield wipers on?

A. No.

Q. Officer, when your partner, Police Officer McNamee, retrieved the gun, did he inform you as to where he retrieved the gun, from what area of the car?

A. Not at that time.

Q. Do you know for a fact where that gun was recovered from?

A. Now, I do.

Q. Is this as a result of conversation with your brother officer and the Assistant District Attorney?

A. Yes.

Testimony of Police Officer Lawrence Meyer

Q. Where was the location at that time?

[11] A. It was recovered from under the front seat.

Q. Did your brother officer inform you how he happened to retrieve the gun?

A. He told me he looked down and saw the handle protruding from the seat.

Q. Did he tell you what part of the handle?

A. The handle.

Q. Just the handle?

A. (Witness nodded.)

Q. There came a time after you [had] placed this Defendant under arrest that you recovered some ammunition, is that correct?

A. Correct.

Q. And, from where did you recover this ammunition?

A. From the Defendant's pants watch pocket.

Q. Officer, do you recall some time that evening where you were interviewed by a police officer—detective—if I may have a moment, your Honor, John Larson, an investigating officer at the 43rd Precinct, when he asked you questions about this arrest, do you recall giving a detailed account of how you—

A. I gave him a brief story of what had transpired. He took down notes and then typed up a Vera report.

Q. Did you—did Police Officer McNamee ever point [12] out to you where he found—where he recovered the gun?

A. No.

Q. You never observed the gun underneath the seat of the car?

A. No.

Q. So, it's—you're testifying that after you engaged in conversation, your brother officer just showed you the gun, pointed—put it in his pocket and you never saw where he got it from, nor—

A. Correct.

Testimony of Police Officer Lawrence Meyer

Q. —engage in any other conversation other than placing this Defendant under arrest, is that correct?

A. Correct.

Q. Do you ever recall telling—informing Detective Larson that after you approached the vehicle, that you made the same observation that your partner made that you sa the handle of the gun protruding from underneath the seat of the—

A. No, what I believe the point you're trying to bring out is—

Q. No, answer the question. Answer the question. Go ahead. Do you recall ever informing Detective Larson that you made the same observation as your partner did?

A. Never did.

Q. Well, I'll show you—mark this Defendant's [13] Exhibit 1 for identification purposes.

The Court: Make it A.

(At this time, a document was marked as Defendant's Exhibit A for identification.)

Court Officer: Defendant's A.

The Court: All right, go ahead.

Q. Officer, I show you defense Exhibit A. Do you know what it is?

A. Yes, this is a precinct Vera report.

Q. Did you read that report after it was made by Detective Larson?

A. I read the report, actually, in—when I was in court in pre-arraignment waiting to have a folder written up by the Assistant District Attorney, at which point, I—there was a discrepancy in the report, and I explained it to him and he made the correction in his folder.

Q. In that report, if you could, does it ever state that you ever told Police Officer—Detective Larson that you made the same observation as to the handle of the gun protruding from the seat as your partner did?

Testimony of Police Officer Lawrence Meyer

* * *

[14]

A. Repeat the last question, please.

* * *

(At this time, the reporter read the requested question.)

A. According to this report, it states that.

The Court: But, the point is, did you tell Detective—the Detective that?

The Witness: No, I never did.

Mr. Campos: I have no further questions of this witness.

The Court: Any redirect?

Mr. Helfer: Just one.

Redirect examination by Mr. Helfer:

[15] Q. On that day, May 11th, 1980, [sic] did you issue any summonses to the Defendant?

A. Yes.

Q. And, what were they for?

A. Unlicensed operator and driving a vehicle with a broken windshield.

Testimony of Police Officer William McNamee

* * *

POLICE OFFICER WILLIAM McNAMEE, Shield Number 29789, 43rd Precinct, Anti-Crime, having been called as a witness for the People, was duly sworn, and testified as follows:

Court Officer: Witness' name is Police Officer [16] William McNamee, M-C-N-A-M-E-E, Shield Number 29789, assigned 43rd Precinct Anti-Crime.

Mr. Campos: Okay, your Honor.
The Court: You're all set?
Mr. Campos: Yea.
The Court: Mr. D.A.?

Direct examination by Mr. Helfer:

Q. Officer McNamee, again, I'll direct your attention to May 11th, this year. Were you working that day?

A. Yes, I was.

Q. And, what was your tour of duty?

A. I was doing ten to six.

Q. Were you working with anybody on that particular day?

A. Yes.

Q. Who was that?

A. Police Officer Meyer.

Q. Did you have occasion to assist Officer Meyer in making an arrest on that day?

A. Yes, I did.

Q. And, what was the name of the person that was placed under arrest?

A. Mr. Class.

[17] Q. And, where was that? Where did that arrest take place?

A. That arrest took place on Westchester and Bronx River Avenue.

Testimony of Police Officer William McNamee

Q. Again, can you tell the Court and Counsel the circumstances leading up to that arrest?

A. While on routine patrol in the confines of the 43rd Precinct, we were proceeding southbound on Bronx River Avenue, when we observed the Defendant driving a Dodge Charger at a high rate of speed with a broken windshield. We made a U-turn.

Q. When you say high rate of speed, can you estimate how fast he was going?

A. A rate of speed for the street, I'd say, was too high for the streets.

Q. Is there any way you could estimate his speed?

A. I really don't know.

Q. Continue.

A. We pulled the Defendant over at Bronx River Avenue and Westchester Avenue. The Defendant got out of his vehicle. He approached us. We got out of our vehicle. He had a conversation with Police Officer Meyer. I approached the vehicle, I opened the door of the vehicle and I looked on the side of the door for a VIN number. I didn't see a VIN on the side of the door, then I went to the dashboard. There was something [18] obstructing the VIN on the dashboard. What it was, I don't know. I pushed it out of the way and as I did that; I looked down and I saw what appeared to me as a handle of a gun sticking out from the driver's seat underneath. I then—

Q. You say what appeared to you a handle of a gun. What did you see, if you can describe it.

A. Well, it was a dark handle of a gun.

Q. What color was it? You say dark. Do you know what color it was?

A. I don't know if it was dark brown or black.

Q. Continue. What did you do?

A. I retrieved the gun from underneath the seat, which was a .22 caliber revolver, loaded with six rounds. I then

gave the gun and the ammunition to Police Officer Meyer to be vouchered at the precinct.

Mr. Helfer: I have no further questions, Judge.
The Court: You can inquire.

Cross-examination by Mr. Campos:

Q. Officer McNamee, did you make any notes or memoranda with respect to this arrest?
A. Yes, I did.
Q. Do you have that with you?
A. They're up in the office.

[19] Mr. Campos: Your Honor, I have not received any notes or memoranda. I have received a copy of the notes and memoranda made by Police Officer Meyer, but I—

The Court: They're in the D.A.'s office. Ask the other officer if he can go up and get them right away.

The Witness: It's in my briefcase.

The Court: It's in his briefcase. You can continue.

Q. Officer McNamee, when you testified that what drew your attention to this Defendant's car was the high rate of speed in which he was driving, is that correct?
A. That's correct.
Q. And, you said it was too high for the streets, is that correct?
A. That's correct.
Q. What do you mean by that it's too high for the streets. Does it mean he was going forty-five miles an hour, thirty-five miles an hour?
A. I really don't know how fast he was going, but it was fast because he passed us at a high rate of speed. I really couldn't tell you what rate of speed he was traveling.

Testimony of Police Officer William McNamee

Q. This was approximately four-thirty in the afternoon on a weekday?

A. Yes.

[20] Q. And, the traffic flow was pretty heavy at that time, is that correct?

A. I imagine it was, yea.

Q. At that intersection, Bronx River Avenue and Westchester Avenue, is a pretty busy intersection.

A. Yes.

Q. Especially at that time.

A. Yes.

Q. When you first noted this Defendant's car, were there other cars—was the traffic flow going northbound, was it heavy or was it—or was it light?

A. I would say it was light.

Q. You say this Defendant had a '72 Dodge Charger, is that correct?

A. That's correct.

Q. Was the car kind of souped up in any way?

A. It had a raised back.

Q. Had oversized tires?

A. Yes.

Q. Sort of looks like race tires on it?

A. Yes.

Q. Was it two door or four door?

A. Two door, I believe.

Q. And, you said it had a cracked windshield, is [21] that correct?

A. That's correct.

Q. On the passenger side or the driver's side?

A. I don't recall.

Q. Do you recall the weather conditions, how the weather that day—

A. No.

Q. Sunny? Was it raining?

A. I don't recall, no.

Testimony of Police Officer William McNamee

Q. You were the recorder in that—in your unmarked car, is that correct?

A. I think I was the operator.

Q. When you began to follow this Defendant after making the U-turn, how fast was it you and your brother officer [were] going?

A. I don't know, just in order to catch up to him. I don't know how fast we were going.

Q. Did you accelerate to a high rate of speed?

A. I imagine we did accelerate.

Q. Did you go through any lights?

A. No.

Q. Did you put any flashers on, like the red flasher that you use to identify yourselves as police officers?

A. I don't know if we had the light on, but we hit the [22] siren.

Q. And, how far did the Defendant's car travel from the first time that you got in the same lane that he was going? How far did you travel?

A. Approximately a block.

Q. And, at that time, you—did you pull over next to him, next to the Defendant's car?

A. Yes.

Q. Was he in—was he waiting for a light?

A. I believe so, yes.

Q. At that time, and you identified yourselves as police officers.

A. That's correct.

Q. There came a time that, then, that my client got out of his car and engaged in conversation with your brother officer, is that correct?

A. That's right.

Q. And, you proceeded to go to Defendant's car, is that correct?

A. That's correct.

Testimony of Police Officer William McNamee

Q. And, did you go to the passenger side first or driver's side?

A. No, the driver's side.

Q. And, were you looking for the Defendant's VIN number [23] at that time?

A. That's correct.

Q. Where was the VIN number located in this car?

A. On the dashboard.

Q. And, it's clearly visible from outside the car, is that correct?

A. Yes, if there's nothing blocking it.

Q. And, you testified there was something blocking it.

A. Yes.

Q. What was blocking it?

A. I don't know. I don't recall. It could have been a piece of paper.

Q. Was the door open or did you open the door of the car?

A. I opened the door of the car.

Q. And, did you—you stated you were looking on the side of the door, is that correct?

A. That's correct.

Q. What were you looking for on the side of the door?

A. On older model cars, the VIN numbers are on the—its door.

Q. Didn't you just testify you saw the VIN on the side of the dashboard?

[24] A. I looked on the side of the door first, then—

Q. How many VIN numbers does a Dodge normally have?

A. They have one as far as I know.

Q. Officer, you then removed this unknown object from the dashboard and you—you saw the VIN number, is that correct?

A. That's correct.

Q. And, did you check it with anything?

A. No.

Testimony of Police Officer William McNamee

Q. Did you copy it down?

A. Police Officer Meyer might have.

* * *

Q. After you looked at the VIN number, what did you further observe then, sir?

A. That's when I looked down and saw what appeared to me as a handle of a gun.

Q. When you first opened the door, you never looked down toward the driver's side?

A. No.

Q. First looked on the side of the door, is that correct?

A. That's right.

[25] Q. When you saw the handle, how much of the handle did you see? Did you see the total part—the whole handle, part of the handle?

A. I'd say it was half a handle.

Q. Did you know it was a gun by your observation?

A. It appeared to me as a gun.

Q. You were not sure?

A. No.

Q. How much of the handle, in terms of inches, for the Court and for the Assistant District Attorney and myself, was protruding, if you can estimate?

A. Approximately an inch.

Q. After you recovered the gun, what did you do with the gun at that time?

A. I put it in my pocket.

Q. Where was the Defendant and your brother officer at this time?

A. They were right in back of the car.

Testimony of Police Officer William McNamee

Q. Of your car or—

A. No, right in back of the Defendant's car.

Q. Did you ever—did you engage in conversation with your brother officer at that time?

A. Yes, I did.

Q. Did you show your brother officer where you got the [26] gun from?

A. Yes.

Q. You did shown him?

A. (Witness nodded.) I don't know. Excuse me. I don't know if I showed him or just told him. I said it was underneath the front seat of the car.

Q. Did you go also, were you toward the front of the car?

A. No. No.

* * *

Q. Did the VIN number on the car match the VIN number on the registration, if you know?

A. I don't know. I imagine it did. Police Officer Meyer I'm sure checked it out.

Q. Officer, you have your memo book now?

A. Yes, I do.

Q. Is that correct? Could you show me the entry you made, if any, of the arrest concerning May 11th?

A. Yes, it's right here.

Q. May I see it?

(At this time, Mr. Campos examined the memo book entry.)

Q. Thank you, Officer. When you stopped the Defendant and placed him under arrest, did he at any time tell [27] you—did you ever ask him if the gun belonged to him?

A. No.

Testimony of Police Officer William McNamee

Q. Did [you] ever ask your brother officer if the gun belonged to him?

A. Not that I know of.

Q. Did he ever say anything to you concerning the gun?

A. No.

Q. Other than the fact that my client was driving without a license, everything in the car concerning insurance and registration checked out to the best of your knowledge, is that correct?

A. As far as I know, yes.

Mr. Campos: I have no further questions of this witness.

* * *

Testimony of Defendant, Benigno Class

* * *

[28]

BENIGNO CLASS, having been called as a witness in his own behalf, was duly sworn, gave his residence as Bronx, New York, and testified as follows:

Court Officer: Witness gives his name as Benigno Class, resident of Bronx.

The Court: Okay.

Direct examination by Mr. Campos:

Q. Mr. Class, in a nice, clear voice, in answering my questions, raise your voice so that the Judge could hear you and the court reporter can take everything down. Where do you live, sir?

A. I live in 1905 Andrews Avenue.

Q. And, with whom do you live, sir?

A. My wife and my kids.

Q. How long have you been living there?

A. I been living there approximately two years now.

Q. Are you employed?

A. Yes.

Q. For whom do you work, sir?

A. Well, right now, they call CBS Toys.

Q. Where is that located?

[29] A. Ten-fifty-five Bronx River Avenue.

Q. And, at the time, on May 11th, the time you were arrested, were you in there?

A. I was coming out of work.

Q. What do you do for CBS Toys?

A. I work in [the] stockroom. I'm a high/low driver. I'm a set-up man.

Q. Mr. Class, directing your attention to May 11, 1981 at approximately four-thirty in the afternoon, can you tell

this Court what happened at the time you got into your car at the time you were stopped by the police officers?

A. What—I had my car parked about, on Bronx River Avenue, just about at the corner, about three cars away from the corner.

Q. Where were you coming from, sir?

A. I was coming out of work.

Q. Continue.

A. I went into the car, started the car, let it warmed up, and went—follow along through. I was going home.

Q. How—do you recall how fast you were driving?

A. I wasn't driving too fast because it was raining.

Q. Was it raining heavily or was it raining heavily [sic] or was it raining lightly?

A. No, earlier, it was raining heavy and it was just like [30] —at the time I got into my car, I had pulled out, it was like sunshower was coming down, more or less.

Q. How far did you drive before you got from—just before you got stopped by the police?

A. Before the police approached me, I got, what, about from my job—from the destination that I pulled out, I say about a half block.

Q. Did you recall, again, how fast you were going, miles per hour, do you recall, if any?

A. The most, maybe twenty.

Q. You recall the traffic conditions at that time on that day?

A. It was about six cars ahead of me.

Q. Do you recall—when was the first time you ever saw the police officers' car? At that time.

A. He pulled out by my lefthand side. That was waiting for the light.

Q. What happened after the police officer pulled over alongside of you?

A. Well, he pulled over alongside of me, told me he's a police officer, pulled over, and [he] was on my left side. I waited for the traffic to go by, I pulled over to my righthand side to the curb, stopped. I got out of my car and approach them.

[31] Q. When you approached them, who did you approach, which police officer, the first police officer that testified or the second police officer that testified?

A. The first police officer testified.

Q. And, what—continue. What happened thereafter?

A. Well, I approached them. I told them what can I do, Officer? He told me about the windshield. I told him, yes, I know, then he asked me for the registration and a license. I gave him the registration, the insurance sticker, and I told him, I have no license on me.

Q. Do you recall what the other police officer was doing at this time?

A. The other police officer, as soon as he went out of his car, he went directly to my car.

Q. Did you see what he did, if anything?

A. Well, he went to my car. He went around, following my car to the front, and came to the driver's side.

Q. What did he do when he got to the driver's side of the car?

A. Well, at that time, I was talking with the other officer. I didn't notice when he went into the car. I didn't notice.

Q. When—did you see him inside your car?

A. I seen the door open, because I turned around, since I [32] was talking to police officer—to the first police officer, I came up, I was talking to him. When I gradually turned around like this, because I approached—I approached them. When I gradually turned around, I seen the other police officer with the—holding my door open to the driver's side. Open.

Q. Did he have anything in his possession at that time?

A. No, not that I know of.

Q. Did the police officer ever show you a gun?

A. He approached me. I was talking to the police officer. He came over. He approached me. He tells me this is yours.

Q. And, what did he show you?

A. He showed me a .22 caliber.

Q. You heard the last police officer, Police Officer McNamee testify that there was a VIN number—he's looking for a VIN number on your car. By the way, is that car yours?

A. No.

Q. Whose car is it?

A. My brother-in-law's.

Q. The VIN number on that car, where is it located?

A. It's located right next to the dash.

[33] Q. Is it visible from outside the car?

A. Yes.

Q. Was there any—if you recall, was there any object covering the VIN number on that day?

A. No. I never keep nothing on the dashboard.

Q. So, it's not necessary to open the door in order to look at the VIN number, is that correct?

A. No.

Q. After Police Officer McNamee got the gun, what happened—what happened thereafter? Were they—did they talk about—did you see them talking about anything?

A. Well, after he got the gun, he just turn me around, shoved me against his car, in front of his car, handcuffed me and threw me in the back seat of his car, wait about five minutes or four minutes, something like that. Squad car came and took me.

Q. What happened to the car thereafter, do you recall?

A. The car, after that, I don't know what happened to it.

Testimony of Defendant, Benigno Class

Q. You have the car in your possession now?

A. Yes.

Q. So, the police gave the car back to your family, is that correct?

A. Yes.

* * *

[35]

Cross-examination by Mr. Helfer:

Q. Mr. Class . . .

A. Yes?

Q. What is the address of the factory where you work?

A. Ten-fifty-five Bronx River Avenue.

Q. And, how far is that from the intersection where you stopped for the light?

A. That's only a block and a half.

Q. All right, and that is the intersection where the police officers pulled you over, is that correct?

A. The police officers, when they first approached me, I was—yes, a half a block down from where I started from, where I pulled out from.

Q. Are you saying they approached you prior to your getting to that traffic light?

A. Yea.

Q. And, where would you say they first approached you?

A. It's a company that's called Dawson.

The Court: With a D?

The Witness: Yes. They make doors. Right in front of them, that's when they first approached me.

[36] Q. How far is that from the toy factory?

A. From the toy factory, that's a half a block.

Q. And, where were they when they first approached you?

A. They just pulled over on my lefthand side.

Q. And, what lane were you in at that point?

A. Over to my lefthand lane. I was going to make a lefthand turn.

Q. And, they pulled over to your lefthand side?

A. They were over the double line.

Q. Over the double line, and did they say anything to you or do anything at that point?

A. Well, he told me—police officer, can you pull over?

Q. He rolled down the window?

A. Yes.

Q. And, you remember which officer spoke to you?

A. The one that was sitting in the passenger side.

Q. You remember whether it was the first officer?

A. That was the second officer that testified.

Mr. Campos: May the record—that's Police Officer McNamee, your Honor.

Q. And, when you pulled over, when you pulled over, was that at the traffic light?

A. I pulled over right on the corner.

[37] Q. Okay. Was there a traffic light there?

A. Yes, right in the corner.

Q. Is there a traffic light in front of this Dawson Company?

A. No.

Q. Okay. How far is it from the Dawson Company to the traffic light?

A. To the traffic light, about a quarter of a block.

Q. Quarter of a block?

A. Yes, I say it's about six cars ahead of me. It was about six cars ahead of me. They pulled over. I was just

about to start for the light when they pulled over on my lefthand side. He didn't show me no shield, nothing. He just tole [sic] me he's police officers, can you pull over, and I pulled over.

Q. You said it was a half a block from the toy company to Dawson, to the front of Dawson, is that correct?

A. Correct, more or less.

Q. You say it's another quarter of a block to the corner . . .

A. To the corner.

Q. . . . of the block where you pulled over. Before, you told us it was a block and a half from the toy company to the traffic light.

[38] A. More or less, it's about a block and a half.

Q. And, where was your car parked?

A. My car was parked almost into the corner of Bronx River Avenue.

Q. Is that the corner where the traffic light is?

A. No.

Q. Which corner is that?

A. I think it's—if I recall, I'm not sure of the name of the street.

Q. If you—when you came out of the toy factory and you walk towards your car, would you be walking in a southerly direction or northerly direction?

Mr. Campos: Of what, your Honor.

The Court: As he came out of the factory.

A. I came out of my job, I went across the street to my car.

Q. Was your car directly across the street from the factory?

A. No.

Q. Where was it?

A. It was, like, bearing to my lefthand side, across the street, more towards the corner.

Q. Okay. The corner away from the traffic light?

A. Yea. See, it's one block. That's all complete block, [39] and then on the other side of the street, it's like two small blocks.

* * *

[40] Q. Mr. Class, the day you were stopped by the police, did you have a license on you?

A. No.

The Court: You have to speak up.

A. No, sir.

Q. On that day, were you a licensed operator?

A. No.

Q. Have you ever had a valid license?

Mr. Campos: Objection, your Honor.

The Court: It's very speculative. No, I'm going to sustain it. On that day, he wasn't, when he was stopped.

Q. Now, the weapon that was recovered, was it yours?

A. Yes.

Q. How long had you had it?

Mr. Campos: Objection, your Honor.

The Court: Overruled.

A. What was the question?

[41] Q. How long had you had that weapon?

A. That weapon, I had a couple of weeks.

Q. Now, can you tell me again what happened once the police pulled you over? You said you moved from the left-hand lane, you pulled over to the righthand side of the street?

A. Yes.

Q. And, where did the police come, did they come behind you or on the side of you? Where?

A. Well, at that time, the police officers got behind me.

Q. Okay. Can you tell me what you did at that point?

A. Well, I pulled over to the curb, got out of my car and I approached the police officer.

Q. Now, when you got out of your car, were the police out of their car?

A. They was in the process of coming out of their car.

Q. Okay. How much distance was there between your car and their car?

A. Say approximately about—maybe eight feet.

Q. Now, eight feet between the front of their car and the back of your car?

A. Yea, more or less, eight to ten feet, more or less.

Q. Eight to ten feet, and what kind of—if that distance was eight to ten feet, what kind of distance was there between your passenger door and the passenger door of [42] the police car?

A. Had to be a farther distance, I guess, or probably the same. I don't know exactly.

Q. Well, how far would you say it was from your passenger door to the rear of your car?

A. I don't understand the question.

Q. How many feet approximately is it between your passenger door, the end of your passenger door to the rear of your car, to the end of your car? How long is that?

A. I don't know exactly, I say maybe about three feet.

Q. And, would you say it's approximately the same distance between the passenger door and the police car to the front of the police car?

A. More or less.

Q. I believe the figure you told me was what, three feet, approximately?

A. Yea, about three feet, maybe. I'm not certain about that.

Q. Where was it that you met the police officer? In other words, when you got out of your car and started

walking toward the police vehicle, where was it that you met the police officer?

A. Well, I started walking toward the police officer, right? He was coming out of his door, the driver's side.

[43] Q. Right.

A. So, as the police officer that I went to, I started talking to, he asked me for the papers. I told him, yes, officer.

Q. Before you go on, you say you started talking to him. Where was it that you first encountered each other, that you first had words with each other?

A. I was by the side of his bumper.

Q. What's that?

A. By the bumper of the car. His door was here (indicating) I was by the bumper.

Q. By the bumper of the police car?

A. The detective's car, yes.

Q. So that at some point, when you had gotten out of your car and walking toward the police car, you saw the police officers get out of the car.

A. Yes, they was getting out.

Q. When you got out of your car, how did you walk over to the police—to the police car?

A. Walked.

Q. Walked slowly, quickly, normally? How?

A. The way I always walk. I guess normally.

Q. Did you have any particular reason for getting out of your car and going to the police car at that point?

[44] A. Well, I guessed that's the logical thing to do. I figure that the logical thing to do, go politely to the man, and you ask him what can I do for you?

Q. You knew where your gun was at that time, is that correct?

A. Excuse me?

Q. You knew where your gun was at that time?

A. Yes.

Q. When you approached the officer, did he say anything to you?

A. Excuse me?

Q. When you approached the officer, did he say anything to you?

Q. Well, he asked me for the papers for the car.

Q. And, you responded by giving him whatever you had.

A. Yes.

Q. And that you had to go back to your car to get it or—

A. No.

Q. You had handed it to that particular first officer who testified right there on the spot, right?

A. Yes.

Q. And, what was the other police officer doing when you were talking to the—

[45] A. The other police officer came out of his car, on the passenger side and walk directly toward my car. The car that he just came out of, and no point he talk to me. He went directly to the car.

Q. When you had words with the first police officer.

A. Yes.

Q. . . . do you remember where the second police officer was?

A. He was already at my car.

Q. And, how far away was he from you?

A. From me? Well, my car was park here (indicating). They stopped about from here to the end of the desk behind me. They stopped about from here.

Q. As you testified before, approximately eight to ten feet, is that right?

A. Yea, right, so I was talking to the other officer, asking me for the papers. When I look like, look, then I seen the other cop in my car.

Q. How far was that from where you were standing?

A. Possibly from the door that he opened up to where I was standing, I said, maybe about six, something like that. I have no ruler magic.

Q. Was there any communication at that point—at the point you were handing the papers over to the first [46] officer? Was there any communication between the first officer and the second officer?

A. Well, I seen the—they looked at each other. That's all. That's all I noticed.

Q. Now, what point did they look at each other?

A. They looked at each other. One was asking for the paper, the other just kept walking. They just took a glance at each other, and the other officer just kept walking.

Q. Mr. Class, when you carried that weapon, where do you carry it?

A. I don't carry that weapon.

Q. Well, you said it was your gun, is that correct?

A. Yes.

Mr. Campos: Objection, your Honor. It's going beyond the scope of the examination.

The Court: Yes, sustained. He admitted it's his gun and it was in the car.

Q. On that particular day, May 11th, 1981, when did you place the gun underneath the seat?

Mr. Campos: Objection, your Honor.

The Court: I have to sustain it. There's no evidence that he did place it under the seat on May 11th.

Q. Mr. Class, on May 11th—

[47] The Court: You're presuming something that's not evidence.

Testimony of Defendant, Benigno Class

Q. On May 11th, 1981, did you place the gun underneath your seat?

Mr. Campos: Objection, your Honor.
The Court: That, I'll allow.

A. Excuse me?
Q. On May 11th, 1981, did you place the weapon underneath the seat?
A. The weapon was underneath the seat.
Q. I'll ask you the question again. On May 11th, 1981, did you place the weapon underneath the seat?
A. No, sir. No.

Mr. Helfer: I have no further questions.
The Court: Any redirect?
Mr. Campos: No, your Honor.
The Court: Thank you, Mr. Class, you may step down. Do you have any other witnesses?

* * *

Order of the New York Supreme Court, Bronx County Denying Suppression

NEW YORK SUPREME COURT

PART 67—COUNTY BRONX

Indictment Number 1552/1981

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS

Defendant

Present:

HON. WILLIAM J. HOLLAND
J.S.C.

Upon the foregoing papers this motion is decided in accordance with the accompanying memorandum decision.

Opinion filed

Dated 10-13-1981

WILLIAM J. HOLLAND
J.S.C.

Findings of Fact and Conclusions of Law of the New York Supreme Court, Bronx County

SUPREME COURT : BRONX COUNTY

CRIMINAL TERM : PART 67

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

HOLLAND, J.:

A Mapp hearing was conducted before this Court on July 10, 1981, and based on the testimony adduced therein, this Court makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

Police Officers Lawrence Meyer and William McNamee were the People's sole witnesses, and testified that on May 11, 1981 at approximately 4:30 p.m., they were driving southbound on Bronx River Avenue.

Both officers were in civilian clothes, in an unmarked police car. As the officers proceeded southbound they observed the defendant driving a 1972 Dodge Charger in a northerly direction, at an excessive rate of speed. They also noticed that the windshild [sic] of the defendant's car

was cracked. Making a u-turn, the officers pulled alongside the defendant's car and ordered him to stop. The defendant stopped his car at the corner of Westchester Avenue and Bronx River Avenue, and the officers pulled up directly behind him. The defendant immediately got out of his car and approached the officers, who had gotten out of their car. The defendant engaged Officer Meyer in conversation while Officer McNamee went directly to the defendant's vehicle.

Officer Meyer asked the defendant for his license and registration. The defendant produced a registration and insurance card for the vehicle and gave them to Officer Meyer. He told the officer that he did not have a driver's license. While Officer Meyer questioned the defendant, Officer McNamee checked the door panel for the car's VIN. Unable to find the VIN in the door panel, Officer McNamee opened the car door to clear some papers off the dashboard, so he could see the VIN on the dashboard. (Officer McNamee testified that, depending on the model and year of the car, the VIN can be found either on the car door's panel or on the dashboard).

As Police Officer McNamee looked into the vehicle, he observed the VIN and also saw the handle of a gun protruding from under the driver's seat. Officer McNamee seized the gun and called to his partner, who then placed the defendant under arrest. It was subsequently discovered that the gun was loaded with six live rounds of ammunition.

The defendant, testifying on his own behalf, basically corroborated the Police Officer's testimony in all respects except that the defendant testified that the VIN number was located on the dashboard in plain view and denied that there were any papers on the dashboard covering the VIN number. The defendant also stated that the car did not belong to him, but to his brother-in-law.

Findings of Fact and Conclusions of Law

This Court believes the officers' rendition of the facts, and finds that the VIN number on the dashboard was obstructed at the time Police Officer McNamee approached the vehicle.

CONCLUSIONS OF LAW

It is clear that the occurrance [sic] of a vehicle and traffic law violation provides a legitimate basis for an officer's stopping an automobile, and for the issuance of a automobile, [sic] and for the issuance of a summons (People v. Ingle, 36 N Y 2d 413).

Here, the defendant was observed speeding in a car with a broken windshield. Upon his being stopped he immediately exited his car and approached the police car, rather then [sic] waiting in his car for the officers to approach him. Officer McNamee immediately went to the defendant's vehicle to look for the VIN. This was apparently done to determine if the number had been altered or removed thereby indicating a stolen car.

Unable to locate the number on the door panel, the officer sought to get an unobstructed view of the number on the dashboard. In order to do this he was forced to open the vehicle door and move a piece of paper obstructing the VIN. After opening the door and viewing the VIN, he noticed, in plain view, a gun handle protruding from under the driver's seat.

Although at the time the defendant was stopped there was no reason to believe the vehicle he was driving was stolen, the defendant's conduct, that is, immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession, made these officer's actions quite reasonable and prudent under the circumstances.

The governmental interest in checking an automobile's VIN is obvious. In fact, the purpose of the VIN is to provide a ready means by which to determine if a vehicle is stolen.

Here with the VIN out-of plain sight, the officer merely opened the car door to move the papers obstructing his view. To say that the mere opening of the door to view the VIN is an abuse of the defendant's right to privacy is to reject common sense and practical realty [sic] (People v. De Bour, 40 N Y 2d 215, 217).

Both the United States Supreme Court and the Court of Appeals have held that "the crucial factor in determining the legality of police conduct is whether or not that conduct is reasonable". (Terry v. Ohio, 392 U.S. 1; People v. De Bour, *supra;* People v. Ingle, *supra;* People v. Cantor, 36 N Y 2d 106). Nothing adduced at this hearing indicated to this Court any unreasonable conduct on the part of the police officers. The check of the VIN after a legal stop for traffic violation was certainly reasonable under the specific circumstances, notwithstanding any lack of probable cause to believe the car had been stolen. To say that the officer could not open the car door for the limited purpose of viewing the VIN "would place an unrealistic restriction on the performance of his duty". *De Bour* at 218.

Thus, it is clear to this Court that the police conduct was reasonable, that the governmental interest was substantial, and that any intrusion upon the defendant's right to privacy was minimal.

Accordingly, the defendant's motion to suppress physical evidence, specifically the .22 calibre revolver, is denied.
Dated: October 13, 1981

Notice of Appeal to the New York Supreme Court, Bronx County

SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK

against

BENIGNO CLASS,

Defendant.

SIRS:

PLEASE TAKE NOTICE that the above-named defendant hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, from a judgment of conviction rendered against him on December 10, 1981 in the Supreme Court, Part 80, Bronx County, and from each and every part of such judgment.

Dated:

the 8th day of January 1982

Yours, etc.

BENIGNO CLASS
1893 Andrews
Bronx, N.Y. 10453

/s/ BENIGNO CLASS

To: MARIO MEROLA
District Attorney

Clerk of the Supreme Court

(Affidavit of Service Omitted in Printing)

Judgement of the New York Supreme Court, Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 29, 1983

Present: Hon. John Carro, Justice Presiding
Sidney H. Asch
Samuel J. Silverman
Max Bloom
Bentley Kassal, Justices.

No. 17879

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

BENIGNO CLASS,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, Bronx County (Murray Koenig, J.), rendered on December 10, 1981, convicting defendant of criminal possession of a weapon in the third degree,

And said appeal having been argued by Mark Cogan of counsel for appellant, and by Roger L. Stavis of counsel for respondent; and due deliberation having been had thereon,

It is ordered that the judgment so appealed from be and the same hereby is affirmed. [Carro, J.P., dissents in a memorandum.]

ENTER:

JOSEPH J. LUCCHI
Clerk.

Affirmance Without Opinion and Dissenting Opinion of the New York Supreme Court, Appellate Division, First Department

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. BENIGNO CLASS, Appellant.—Judgment, Supreme Court, Bronx County (Murray Koenig, J.), rendered on December 10, 1981, affirmed. Concur—Asch, Silverman, Bloom and Kassal, JJ.

Carro, J. P., dissents in a memorandum as follows: Defendant was stopped for driving 5 to 10 miles above the speed limit and because the windshield on the passenger side was badly cracked. When the officers (who were not in uniform and drove an unmarked patrol car) pulled up next to him, flashed a badge and ordered him to pull over, he did so. Mr. Class got out of the car and walked back to the officers, who had also alighted. One officer asked him for his license and registration, while the other officer went over to the car. Defendant produced an insurance card and the registration, but had no license to show. As defendant and the first officer discussed this, the second officer opened the car door on the driver's side, allegedly to check the Vehicle Identification Number (VIN). There was no VIN on the car door, so the officer (testified that he) checked the dashboard, but it was obstructed by "something", which he pushed away. As he did that he saw what appeared to be the "handle of a gun sticking out from the driver's seat underneath." A .22 calibre pistol was recovered, Mr. Class was arrested and in the ensuing search of defendant, ammunition was recovered. Summonses were also issued for unlicensed operation of a motor vehicle and driving with a broken windshield. The above recitation of the facts is a distillation of the two officers' testimony, which the suppression court accepted. The officers also testified that they had no basis for believing the car to be stolen, the registration papers later checked out as valid (no radio run

was made on the car at any time) and the VIN was never even copied down by the officer who allegedly searched for it. The court below denied defendant's suppression motion by ruling that the gun had been "in plain view" when seized. The court found the initial search for the VIN to be justified, "notwithstanding any lack of probable cause to believe the car had been stolen," because "the defendant's conduct, that is, immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession, made these officer's actions quite reasonable and prudent under the circumstances." Such reasoning bends both logic and the law, the latter in violation of the constitutional prohibition against unreasonable searches and seizures. (U.S. Const., 4th Amdt.) This incident occurred about 4:30 in the afternoon, on a sunny day, right before the onset of rush hour. There was not the slightest hint in the officer's testimony that this was a high crime area or that they were on any more than "routine patrol." The conclusion that defendant's act, of getting out of his car and going to the officers rather than awaiting their approach, constituted suspicious behavior, is absurd. I would do the same thing myself, if for no other reason than the recent tragedies of officers being fired upon as they approach stopped drivers might reasonably create an apprehension that would be dispelled by my exhibiting myself as clearly unarmed. The court's second point is even more illogcial since, by the officer's own testimony, the search of the car by one officer began before the other had yet discovered that defendant was not a licensed driver. Since the search was conducted without any indication of impropriety or preliminary radio run on the license plate, the police action was no more than a wrongful trespass, and the plain view doctrine is inappli-

cable. (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 466, 472.) As the Court of Appeals stated many years ago, "[t]here is no question, and the entire court agrees, that a police officer is not authorized to conduct a search every time he stops a motorist for speeding or some other ordinary traffic infraction." (*People* v. *Marsh*, 20 N.Y.2d 98, 100 [per Fuld, Ch. J.], as affd. in *People* v. *Howell*, 49 N.Y.2d 778, 779.) And while the alleged premise here—to search for the VIN —was less intrusive than a full-blown inventory, it still constituted an impermissible search since there was absolutely no predicate for believing the car was stolen. (*Cotton* v. *United States*, 371 F.2d 385, 393-394; *People* v. *Gohn*, 49 A.D.2d 585.) Nor was there any lawful arrest to which the search was incident. (*People* v. *Erwin*, 42 N.Y.2d 1064, 1065.) Since the officer had no right to be in the car, his observation of the gun handle may not be sanctioned by the plain view doctrine. (*Coolidge v. New Hampshire, supra*, *People* v. *Gohn, supra.*)

Order of the New York Supreme Court, Appellate Division, First Department Granting Leave to Appeal to the New York Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FIRST DEPARTMENT

BEFORE:

JOHN CARRO
Justice of the Appellate Division

Indictment No. 1552/81

THE PEOPLE OF THE STATE OF NEW YORK,

against

BENIGNO CLASS,

I, JOHN CARRO, Justice of the Appellate Division, Supreme Court, First Department, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to CPL 460.20 it is

ORDERED that permission be, and it hereby is, granted to the above-named appellant to appeal to the Court of Appeals.

Dated: New York, N.Y.
December 19, 1983

/s/ JOHN CARRO
Justice of the Appellate Division

* Description of Order: 12/10/81 Sup.Ct. Bx. Co.
Nov. 29, 83/App.Div. 1st Dept.

Notice: *Within 10 days* from the issuance of this certificate, a jurisdictional statement must be filed with the Clerk of the Court of Appeals pursuant to Rule 500.2 of the Court of Appeals Rules.

Judgment of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 520

THE PEOPLE &c.,

Respondent,

v.

BENIGNO CLASS,

Appellant.

The appellant in the above entitled appeal appeared by William E. Hellerstein, Esq., The Legal Aid Society; the respondent appeared by Hon. Mario Merola, District Attorney, Bronx County.

The Court, after due deliberation, orders and adjudges that the order is reversed, motion to suppress granted, conviction vacated and indictment dismissed. Opinion by Judge Kaye in which Chief Judge Cooke and Judges Wachtler, Meyer and Simons concur. Judge Jones dissents and votes to affirm in an opinion in which Judge Jasen concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be

remitted to the Supreme Court, Bronx County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW,

DONALD M. SHERAW,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 27, 1984

Opinion of the New York Court of Appeals

NEW YORK COURT OF APPEALS

No. 520

THE PEOPLE &c.,

Respondent,

v.

BENIGNO CLASS,

Appellant.

(520) Mark C. Cogan & William E. Hellerstein, N.Y. Legal Aid, for appellant.

Mario Merola, DA, Bronx County (Roger L. Stavis & Steven R. Kartagener of counsel) for respondent.

KAYE, J.

A police officer's nonconsensual entry into an individual's automobile to determine the vehicle identification number violates the federal and state constitutions where it is based solely on a stop for a traffic infraction (U.S. Const, 4th Amdt; N.Y. Const, art I, § 12).

On May 11, 1981, in the late afternoon, Police Officers Lawrence Meyer and William McNamee observed defendant driving 5 to 10 miles per hour above the speed limit, in a car with the windshield cracked on the passenger side. The officers drove alongside defendant's car and instructed him to pull over. Defendant followed this directive, emerged

from his car and approached Officer Meyer, the driver of the police car. He provided Meyer with his registration and proof of insurance but stated that he did not have a driver's license in his possession. Meanwhile, Officer McNamee had gone directly to defendant's car, opened the door and checked the left door jamb for the vehicle identification number (VIN). Since the VIN was not located on the door jamb, McNamee reached in and moved papers on the dashboard to enable him to view the VIN. In doing so, he saw a handle of a gun protruding from underneath the seat, seized it, and defendant was promptly arrested.

The hearing court denied defendant's motion to suppress the gun. Although the court concluded that the officers had "no reason to believe the vehicle . . . was stolen" when defendant was stopped, it found their action reasonable in light of defendant's "immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession." Defendant then pleaded guilty to criminal possession of a weapon in the third degree and was sentenced to five years' probation. On appeal to the Appellate Division, the four-Justice majority affirmed without opinion. The dissenting Justice found the search impermissible because "there was absolutely no predicate for believing the car was stolen."

VIN inspections typically involve opening a car door to locate the VIN on the doorpost, opening the hood to locate the VIN on the engine, or looking for the hidden VIN in obscure parts of an automobile. While this court has not previously considered the legality of such inspections conducted without consent, lower courts in this state, as well as courts in other jurisdictions, have approached the question from divergent perspectives. Initially, courts are divided on the threshold issue of whether a VIN inspec-

tion constitutes a search.[1] On the facts presented by this appeal, we conclude that a search was conducted.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy" (*United States* v. *Chadwick*, 433 U.S. 1, 7; see, also, *Katz* v. *United States*, 389 U.S. 347; *People* v. *Perel*, 34 N.Y.2d 462, 466). One has no legitimate expectation of privacy in locations in a car which are observable by passerby. Accordingly, an officer's simply peering inside an automobile does not constitute a search and the Fourth Amendment consequently does not limit this activity (*Texas* v. *Brown*, —— U.S. ——, 103 S. Ct. 1535; *People* v. *Cruz*, 34 N.Y.2d 362, 370). But there are many places inside a car—including the area underneath the seats—which cannot be viewed from the outside and which an individual legitimately expects will remain private. The government intrusion here, Officer McNamee's opening the door and reaching inside, was undertaken to obtain information and it exposed these hidden areas. It therefore constituted a search (cf. *United States* v. *Place*, —— U.S.——, 103 S. Ct. 2637; *People* v. *Miller*, 43 N.Y.2d 789, affg., 52 A.D.2d 425, 428; *People* v. *Sullivan*, 29 N.Y.2d 69).[2]

1. Compare, for example, *United States* v. *Polk* (433 F.2d 644); *United States* v. *Johnson* (413 F.2d 1396, affd. en banc 431 F.2d 441); *Cotton* v. *United States* (371 F.2d 385); *People* v. *Valoppi* (61 Mich. App. 470, 233 N.W.2d 41); and *People* v. *Hart* (75 Misc. 2d 908), with *United States* v. *Powers* (439 F.2d 373, cert. den. 402 U.S. 1011); *Simpson* v. *United States* (346 F.2d 291); *State* v. *Moore* (—— Ha ——, 569 P.2d 70); *People* v. *Piper* (101 Ill. App. 3d 296, 427 N.E.2d 1361); and *State* v. *Simpson* (95 Wash.2d 170, 622 P.2d 1199). Though not treating a VIN inspection as a search, some courts have limited the officers' right to check the VIN "to those cases in which there is a legitimate reason to do so" (see, e.g., *Cotton* v. *United States*, 371 F.2d 385, 393, *supra*). The basis for imposing this limitation is not clear.

2. Although the gun was "protruding" from underneath the seat, Officer McNamee first observed it while conducting the search. The only question, then, is whether the officer had a right to be in the position from which he made his observation.

The absence of any legitimate expectation of privacy in the VIN itself is not determinative of the issue presented. The fact that certain information must be kept, or that it may be of a public nature, does not automatically sanction police intrusion into private space in order to obtain it. In particular, the existence of a VIN on every automobile cannot enable police, without any basis, to make "wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen." (1 W. LaFave, Search and Seizure, § 2.5, p. 360.)[3]

A VIN inspection normally involves a lesser invasion of privacy than a full-blown search because of the fixed, known and readily accessible location of the VIN on the automobile. Additionally, there is a compelling police interest, in situations such as automobile thefts and accidents, in the positive identification of vehicles. Consequently, it may well be that some lesser justification than probable cause would be appropriate. However, it is unnecessary in this case to determine whether probable cause or a lesser justification should have been required to support the search, because here there was no semblance of either. The trial court based its apparent finding of reasonable suspicion to believe the car was stolen on two factors: defendant's exiting the vehicle and approaching the officers and his failure to produce a driver's license. But a driver's emergence from a car upon being stopped by police is not indicative of criminal activity. Nor was reliance properly placed by the court on defendant's failure to produce a license because McNamee, having proceeded directly to defendant's car, was not even aware of that fact when he entered the automobile. Since competing inferences cannot reasonably be

3. We are not confronted with a governmental intrusion so circumscribed as to expose only information or articles in which there is no legitimate expectation of privacy (compare *United States* v. *Place*, 103 S. Ct. 2637, *supra*; *Smith* v. *Maryland*, 442 U.S. 735). Nor are we concerned here with an inventory of an impounded car.

drawn from the undisputed facts presented, the hearing court erred as a matter of law in finding reasonable suspicion to believe the car was stolen (see *People* v. *Harrison*, 57 N.Y.2d 470, 477). The facts reveal no reason for the officer to suspect other criminal activity or to act to protect his own safety (compare *People* v. *David L.*, 56 N.Y.2d 698, cert. den., 459 U.S. 866). The sole predicate for the officer's action here was defendant's commission of an ordinary traffic infraction, an offense which, standing alone, did not justify the search (cf. *People* v. *Marsh*, 20 N.Y.2d 98).

Some lower court cases in New York have interpreted subdivision 4 of section 401 of the Vehicle and Traffic Law as authorizing VIN inspections (see, e.g., *People* v. *Gohn*, 49 A.D.2d 585; *People* v. *Frank*, 61 Misc.2d 450; *People* v. *Goldstein*, 60 Misc.2d 745.) That section provides, in pertinent part:

> Carrying certificate of registration. Every person operating a motor vehicle or a motor vehicle and a trailer, registered or transferred in accordance with any of the provisions of this chapter, shall upon demand of any magistrate, motor vehicle inspector, peace officer, acting pursuant to his special duties, or police officer produce for inspection the certificate of registration or the registration renewal stub for such vehicle and shall furnish to such magistrate, inspector, officer or police officer any information necessary for the identification of such vehicle and its owner, and all information required concerning his license to operate, if he is required by law to have such a license, and shall, if required, sign his name in the presence of such magistrate, inspector, peace officer or police officer as a further means of identification.

In section 401, however, the Legislature has seen fit only to authorize an officer to *demand* information necessary to identify the car, as he may *demand* the certificate of registration for the vehicle.[4] No basis has been shown for ignoring this legislative direction. Here, had the officer complied with the statute and demanded exhibition of the VIN, defendant could have avoided the intrusion on his privacy interests by simply moving the papers on the dashboard, thereby facilitating the officer's observation of the VIN through the windshield. Section 401, therefore, provided no justification for the officer's entry of defendant's car.

Accordingly, the order should be reversed, the motion to suppress granted, the conviction vacated and the indictment dismissed.

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4. No suggestion has been made that the police without basis could search the person of the driver or the interior of the vehicle to obtain a registration certificate, yet the statutory provision is no different for the VIN and the certificate of registration; in both instances the information must be provided on demand of a police officer.

Dissenting Opinion of the New York Court of Appeals

JONES, J. (dissenting):

I would affirm the order of the Appellate Division which upheld Criminal Term's denial of defendant's motion to suppress the .22 calibre revolver. I do not differ with the majority's recital of the facts; I do depart, however, from the legal conclusion that it reaches.

It is undisputed that the police were warranted in stopping defendant's 1972 Dodge Charger. They had observed that it was travelling in excess of the speed limit and that it had a cracked windshield. In this circumstance they were justified not only in stopping the vehicle but thereafter in obtaining its vehicle identification number (VIN).

The requirement that each motor vehicle be assigned a VIN is for the purpose of facilitating rapid, positive identification of each particular motor vehicle. The VIN is functional only when affixed to the particular vehicle and comes into the owner's possession solely by reason of such affixation. The letters and digits constituting the VIN (as distinguished from the tab on which they may be imprinted) have no independent existence and are not susceptible of being possessed by the owner separate and apart from his possession of the vehicle or of being independently "seized" by the police.

The Supreme Court of the United States and our Court have recognized that the owner of a motor vehicle has only a diminished expectation of privacy with respect to the contents of an automobile that is being operated on the highway (*United States* v. *Chadwick*, 433 U.S. 1, 11-13; *People* v. *Belton*, 55 N.Y.2d 49, 53). With respect to a VIN affixed to a motor vehicle, however, once the vehicle is on the high-

way the owner can have no expectation of privacy.[1] The purpose of the VIN is to proclaim the identity of the vehicle, a purpose quite inconsistent with any legitimate privacy interest of the owner.

The police on the other hand have a compelling interest, usually in the identification of a particular motor vehicle, but always in the ready availability of a near-infallible method of vehicular identification. Positive identification of a motor vehicle may be sought by them for a variety of regulatory and administrative objectives as, for example, to establish correlation with a registration certificate produced by the driver, to make positive identification of a vehicle involved in an accident, or to determine whether the vehicle has been stolen. Its identification may also be sought, of course, for purposes of recovery of a vehicle previously known to have been stolen, but in many instances when inspection of the VIN is made the police have no intimation of actual pre-existent criminal activity. Familiar concepts with respect to the necessity for probable cause to justify a search for or seizure of criminal evidence or contraband would be applicable to VIN inspection only if the objective of the police action was search for proof with respect to known or suspected pre-existing criminal activity. These concepts are immaterial and have no application where, as here, there is no evidence that such was the purpose of police inspection of the VIN, the objective of which was identification of the vehicle only, with no

1. A large number of cases have expressly held that there is no expectation of privacy in a VIN (e.g., *United States* v. *Powers*, 439 F.2d 373 [4th Cir.], cert. den., 402 U.S. 1101; *United States* v. *Polk*, 433 F.2d 644 [5th Cir.]; *United States* v. *Graham*, 391 F.2d 439 [6th Cir.], *cert. den.*, 393 U.S. 941; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.]; *State* v. *Colon*, 316 A.2d 797 [Conn. Cir.]; *Commonwealth* v. *Hason*, 439 N.E.2d 251 [Mass.]; *People* v. *Brooks*, 274 N.W.2d 430 [Mich.]; *People* v. *Brewer*, 317 N.W.2d 218 [Mich. App.]; *People* v. *Valoppi*, 233 N.W.2d 41 [Mich. App.]; *Commonwealth* v. *Grabowski*, 452 A.2d 827 [Pa. Super.]).

thought of connection with known or suspected previous criminal activity. The purpose of the police was to obtain information, not to seize physical evidence.[2]

In sum, except possibly in exceptional circumstances, I would hold that whenever the police are justified in making a traffic stop (cf. *People* v. *Ingle*, 36 N.Y.2d 413) they are authorized to inspect the VIN.

After the concededly permissible traffic stop in this instance Officer McNamee opened the driver's door of the vehicle in expectation of finding the VIN on the inside panel of the door. Not finding it there he went directly to the

2. Several courts have adopted the view that entry into a motor vehicle to find the VIN is not a search for purposes of the Fourth Amendment (e.g., *United States* v. *Forrest*, 620 F.2d 446 [5th Cir.]; *United States* v. *Duckett*, 583 F.2d 1309 [5th Cir.]; *United States* v. *Williams*, 434 F.2d 681 [5th Cir.]; *United States* v. *Polk*, 433 F.2d 644 [5th Cir.], *supra*; *United States* v. *Johnson*, 413 F.2d 1396, *affd. en banc*, 431 F.2d 441 [5th Cir.]; *United States* v. *Graham*, 391 F.2d 439 [6th Cir.], *cert. den.*, 393 U.S. 941, *supra*; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.], *supra*; *Cotton* v. *United States*, 371 F.2d 385 [9th Cir.]; *State* v. *Renfrow*, 597 P.2d 546 [Ariz.]; *State* v. *Cohn*, 284 So.2d 426 [Fla. App.]; *People* v. *Brewer*, 317 N.W.2d 218 [Mich. App.], *supra*; *People* v. *Valoppi*, 233 N.W.2d 41 [Mich. App.], *supra*; *Fox* v. *Commonwealth*, 189 S.E.2d 367 [Va.]. Many courts have upheld the VIN inspection, even if it be termed a search, in circumstances amounting to less than probable cause (e.g., *United States* v. *Dadurian*, 450 F.2d 22 [1st Cir.], *cert. den.*, 405 U.S. 1044; *United States* v. *Powers*, 439 F.2d 373 [4th Cir.], *cert. den.*, 402 U.S. 1101, *supra*; *United States* v. *Duckett*, 583 F.2d 1309 [5th Cir.], *supra*; *United States* v. *Ware*, 457 F.2d 828 [7th Cir.], *supra*; *United States* v. *Powless*, 546 F.2d 792 [8th Cir.]; *United States* v. *Brown*, 535 F.2d 424 [8th Cir.]; *Cotton* v. *United States*, 371 F.2d 385 [9th Cir.], *supra*; *State* v. *Renfrow*, 597 P.2d 546 [Ariz.], *supra*; *State* v. *Colon*, 316 A.2d 797 [Conn. Cir.], *supra*; *People* v. *Wolf*, 326 N.E.2d 766 [Ill.]; *People* v. *Brewer*, 317 N.W.2d 218 [Mich. App.], *supra*; *Wood* v. *State*, 632 S.W.2d 734 [Tex. App.]; *Fox* v. *Commonwealth*, 189 S.E.2d 367 [Va.], *supra*; cf. *United States* v. *Squires*, 456 F.2d 967, 970 [2d Cir.]). Research has disclosed only six reported cases in which police inspection of a VIN has been struck down (*United States* v. *Nikrasch*, 367 F.2d 740 [7th Cir.]; *Simpson* v. *United States*, 346 F.2d 291 [10th Cir.]; *State* v. *Moore*, 659 P.2d 70 [Haw.] *People* v. *Piper*, 427 N.E.2d 1361 [Ill. App.]; *State* v. *McGann*, 467 A.2d 571 [N.H.] *State* v. *Simpson*, 622 P.2d 1199 [Wash.]).

other location where to his knowledge the VIN would be found—on top of the dashboard on the driver's side. When he observed that view of the VIN in that location was obscured by some papers, he reached inside the vehicle and moved them aside to view the VIN. That he did not first request defendant to remove the papers or seek his consent to do so is immaterial; such consent could not permissibly have been withheld. The officer was not searching for or intending to seize any physical evidence on the ground that he had probable cause to believe that a crime had been committed; he was seeking information relevant and appropriate to the traffic stop which all concede he had been authorized to make.

The right of the police to inspect the VIN affixed to a motor vehicle is to be distinguished from the right of the police to search for or to seize a vehicular registration certificate. Registration of a motor vehicle, with the related license plates, in contrast to a VIN, serves to describe a vehicle and identify its owner and constitutes proof that the vehicle has been properly licensed for operation on the highway for a specified period of time, customarily one year. In the course of its life a motor vehicle may be, and customarily is, the subject of several different registration certificates, reflecting different periods of licensing and usually successive ownership. A registration certificate may be independently possessed by its owner, on his person, in the glove compartment of the vehicle, or otherwise. Without probable cause the police would have no right to search the person of the driver or the interior of the vehicle to obtain a registration certificate. Penalties might attach to the failure of the driver to produce the registration certificate, but that fact would not enlarge the right of the police to search. The VIN, however, is intended to be indelibly affixed to the particular vehicle throughout its existence, irrespective of changing ownership of the vehicle

and whether or not it is licensed for operation on the highway. As its name states, its purpose is vehicle registration without reference to ownership or licensure for operations.[3]

Inasmuch as in this instance the police had the right to inspect the VIN of the 1972 Dodge[4] and the revolver was observed inadvertently and without intention to search for it, under the plain view doctrine it should not be suppressed (see *Texas* v. *Brown*, —— U.S. ——, 103 S. Ct. 1535).

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Order reversed, motion to suppress granted, conviction vacated and indictment dismissed. Opinion by Judge Kaye in which Chief Judge Cooke and Judges Wachtler, Meyer and Simons concur. Judge Jones dissents and votes to affirm in an opinion in which Judge Jasen concurs.

Decided November 27, 1984

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3. The right to inspect the VIN would not, of course, justify a rummaging search of a motor vehicle. The officer would be warranted only in going directly, as he did in this case, to a location where by the officer's advance knowledge the VIN was to be found. By like token, a pretext search would not be condoned.

4. I would reach this result without reference to the provisions of Vehicle and Traffic Law, § 401(4).